



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

# FY 2021 CONGRESSIONAL BUDGET JUSTIFICATION

February 10, 2020

# Contents

<b>I. Introduction.....</b>	<b>- 3 -</b>
<b>II. Overview of ACUS.....</b>	<b>- 5 -</b>
<b>A. Brief History of ACUS.....</b>	<b>- 5 -</b>
<b>B. Membership.....</b>	<b>- 6 -</b>
<b>C. Staff and Office of the Chairman .....</b>	<b>- 7 -</b>
<b>D. Program Description .....</b>	<b>- 8 -</b>
<b>III. Strategic Goals and Notable Activities.....</b>	<b>- 8 -</b>
<b>A. Strategic Goals .....</b>	<b>- 8 -</b>
<b>B. Notable Activities .....</b>	<b>- 9 -</b>
<b>1. Recently Adopted Recommendations .....</b>	<b>- 9 -</b>
<b>2. Recent Reports and Other Publications .....</b>	<b>- 11 -</b>
<b>3. Projects Underway .....</b>	<b>- 13 -</b>
<b>4. Collaborative Initiatives Through the Office of the Chairman.....</b>	<b>- 16 -</b>
<b>5. Assistance to Congress and Federal Agencies by the Office of the Chairman .....</b>	<b>- 17 -</b>
<b>IV. Budget Status and Request .....</b>	<b>- 18 -</b>
<b>A. Proposed Appropriations Language for FY 2021.....</b>	<b>- 18 -</b>
<b>B. Budget Authority and Staffing by Activity.....</b>	<b>- 18 -</b>
<b>C. ACUS Organization Chart.....</b>	<b>- 19 -</b>
<b>D. Financial Summary.....</b>	<b>- 20 -</b>
<b>E. Recent Appropriations History .....</b>	<b>- 21 -</b>
<b>F. FY 2021 Request .....</b>	<b>- 22 -</b>
<b>1. Agency Personnel .....</b>	<b>- 22 -</b>
<b>2. Research, Consulting, and Professional Services .....</b>	<b>- 24 -</b>
<b>3. Support and Infrastructure.....</b>	<b>- 25 -</b>
<b>4. New Statutory Mandate.....</b>	<b>- 26 -</b>
<b>V. Conclusion .....</b>	<b>- 27 -</b>
<b>Appendix A: Council Members .....</b>	<b>- 28 -</b>
<b>Appendix B: Government Members .....</b>	<b>- 31 -</b>
<b>Appendix C: Public Members.....</b>	<b>- 32 -</b>
<b>Appendix D: Liaison Representatives, Senior Fellows, and Special Counsels ...</b>	<b>- 33 -</b>
<b>Appendix E: Recommendations and Statements Adopted 2010 – 2019 .....</b>	<b>- 36 -</b>

## I. Introduction

The President's budget for FY 2021 requests \$3.5 million for the Administrative Conference of the United States (ACUS). ACUS submits this justification in support of the Administration's request that Congress increase ACUS's existing annual appropriation of \$3.1 million by \$400 thousand for FY 2021. This funding increase will permit ACUS to fulfill a new congressionally mandated reporting requirement from the Equal Access to Justice Act (EAJA) (Public Law 116-09), which became law on March 12, 2019. These additional resources support the creation of a software database and publicly accessible website, and supports one additional lawyer.

ACUS is a unique executive branch agency whose principal mission is to recommend improvements in agency rulemaking, adjudication, and other regulatory processes to the president, federal agencies, Congress, and the federal judiciary. Recommendations are designed, in the words of the Administrative Conference Act, to (1) "protect private rights," (2) ensure that federal agencies' "regulatory activities . . . are carried out expeditiously in the public interest," (3) "promote more effective participation and efficiency in the rulemaking process," (4) "reduce unnecessary litigation in the regulatory process," (5) "improve the use of science" in that process, and (6) "improve the effectiveness of laws applicable" to that process. 5 U.S.C. § 591.

Through its Office of the Chairman, ACUS also helps individual agencies improve programs, provides for the exchange of information among agencies, publishes sourcebooks of enormous value to both the government and public, provides nonpartisan advice to agencies and Congress, and prepares reports designed to improve agency regulatory programs. The Office of the Chairman's advice-giving and related functions are sometimes mandated by Congress. An example is the recently enacted, bipartisan Strengthening Protections for Social Security Beneficiaries Act of 2018 (Public Law 115-165), which requires ACUS to prepare a report for the Social Security Administration (SSA) with recommendations to improve the program under which SSA appoints legal representatives for beneficiaries who cannot manage their own finances. Another example is recent legislation (codified at 5 U.S.C. § 504 and 28 U.S.C. § 2412) that requires ACUS to report on attorney's fee awards in litigation against the government.

ACUS has a demonstrated record, as no other agency does, of improving the fairness and efficiency of government programs for the benefit of the American public. In doing so, ACUS often saves money for the taxpayers well in excess of its annual appropriation.

Many of ACUS's recommendations have been adopted by federal agencies, cited in judicial opinions, or enacted into law. Notable examples of implementation include:

- **Recommendations 2017-5, 2019-1, and 2019-3, *Agency Guidance Through Policy Statements, Agency Guidance Through Interpretive Rules, and Public Availability of Agency Guidance Documents***, which the President relied upon in issuing Executive Orders 13,891 and 13,892, which generally require agencies to announce the non-binding nature of guidance documents, request public comment when issuing guidance documents, and put those documents on their websites.

- ***Model Adjudication Rules (Office of the Chairman, 2018 Revision)***, upon which a number of agencies, including the Occupational Safety and Health Review Commission, have based comprehensive revisions to their procedural rules.
- ***Recommendation 2017-1, Adjudication Materials on Agency Websites***, which SSA pledged to follow by making its disability adjudication decisions available on its website.
- ***Recommendation 2016-3, Special Procedural Rules for Social Security Litigation in District Court***, which the Judicial Conference of the United States relied upon in forming a special subcommittee to consider whether to adopt efficiency-enhancing procedural rules governing the over 18,000 social security disability appeals filed each year.
- ***Recommendation 2015-1, Promoting Accuracy and Transparency in the Unified Agenda***, which the Trump Administration followed by including rules that had been dormant for long periods of time in the Unified Agenda of Regulatory and Deregulatory Actions.
- ***The SSA Representative Payee Program (Office of the Chairman, 2015)***, which the Social Security Advisory Board relied upon in its 2018 recommendations to eliminate abuse and fraud by representatives of elderly and disabled recipients of federal benefits.
- ***Recommendation 2014-5, Retrospective Review of Agency Rules***, which the U.S. Senate Homeland Security and Governmental Affairs Committee relied upon when favorably reporting legislation (S. 1420, 116th Cong.) that would require agencies to retrospectively review major regulations.
- ***Recommendation 2013-4, Administrative Record in Informal Rulemaking***, on which the Government Accountability Office relied in a report urging agencies to disclose to the public their policies regarding the treatment of materials submitted for consideration in the rulemaking process.
- ***Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudication***, which SSA implemented in a 2017 regulation that will improve the accuracy of decisions in, and thereby reduce federal court litigation arising from, SSA's multi-billion dollar-per-year disability benefits program.
- ***SSA Disability Benefits Programs: The Duty of Candor and Submission of All Evidence (Office of the Chairman, 2012)***, which SSA used as blueprint for a 2015 regulation requiring claimants to disclose all relevant evidence—not just, as under the previous rule, favorable evidence.
- ***Recommendation 2012-8, Inflation Adjustment Act***, which Congress implemented in the Bipartisan Budget Act of 2015 when it adjusted civil penalties for regulatory violations, with the result that revenues to the federal government will increase tens of millions of dollars annually.

- **Recommendation 2011-5, *Incorporation by Reference***, which the Office of the Federal Register has relied upon—both in a 2014 regulation and more recently in the revised edition of its *IBR Handbook*—to ensure that regulated parties and the public may access copyrighted private standards incorporated into federal regulations.
- **Recommendation 2011-4, *Agency Use of Video Hearings: Best Practices and Possibilities for Expansion***, which SSA has pledged to consult as it maintains and updates the procedures and technologies it uses to conduct video hearings.

ACUS’s oversight committees in Congress have expressed strong bipartisan support for its work. Recently, the Chairmen and Ranking Members of the House Judiciary Committee and its Subcommittee on Administrative Law noted in the Congressional Record that “there is no other independent, non-partisan agency” on which “Congress can call . . . to evaluate ways to improve the regulatory process”; that “[a]s a result of” ACUS’s “excellent work, our Nation’s federal administrative procedures are not only looked to as a standard around the world, but constantly in the course of additional improvement;” and that “in recognition of its many accomplishments” ACUS “has enjoyed broad bipartisan and bicameral support over the years.” They also noted that ACUS “helps save taxpayer dollars.”

On February 27, 2017, several Members of Congress acknowledged the value and contributions of ACUS during the floor debate preceding the passage of the bipartisan Open Book on Equal Access to Justice Act (H.R. 1033, enacted at Section 4201 of Public Law 116-9). One member characterized ACUS as “a highly respected nonpartisan agency which was greatly championed by Justice Scalia” and noted the key role that it “has historically played in helping Congress identify inefficiencies among the Federal agencies.”

Members of the federal judiciary from diverse perspectives, among others, have likewise expressed strong support for ACUS. Justice Breyer and the late Justice Scalia even appeared before a congressional committee to testify in support of ACUS’s authorization. During his testimony in 2010, Justice Scalia observed that ACUS is one of the federal government’s “best bargains for the buck.”

The requested budget of \$3.5 million will enable ACUS to undertake a full program of research projects and other programs aimed at promoting the unique goals of ACUS’s enabling statute. ACUS will also continue to play an active role in implementing its recommendations.

## **II. Overview of ACUS**

### **A. Brief History of ACUS**

Following bipartisan endorsement of the work of two temporary administrative conferences during the Eisenhower and Kennedy administrations, Congress enacted the Administrative Conference Act of 1964. The Act codified the prior structure of these conferences, which emphasized collaboration among a wide array of federal agencies, reliance on experts in administrative law and regulation from the private sector (many of them prominent academics), and the participation of public members representing diverse views. This

collaborative effort is designed to produce consensus-based, nonpartisan recommendations for improving federal administrative processes, which, more than ever, affect every sector of our national economy and the lives of American citizens.

Since the beginning of its operations in 1968, ACUS has adopted hundreds of recommendations, each of them based on careful study and the informed deliberations of its members in an open process that encourages public input. A complete list of these recommendations appears at [www.acus.gov](http://www.acus.gov). Congress has enacted a number of them into law, and agencies and courts have adopted or relied upon many others.

## **B. Membership**

The Assembly is the name given to the 101 statutory voting members of ACUS meeting in plenary session. The 101 members include the Chairman, the Council, Government Members, and Public Members. The Conference's bylaws permit the appointment of certain non-voting members who are not part of the Assembly (as described below), but who contribute immeasurably to ACUS's activities. These individuals are afforded all the privileges of membership except that they may not vote during plenary sessions. None of ACUS's members (except for the Chairman) are compensated for their services.

### **Voting (Assembly) Members**

#### **The Chairman**

The ACUS Chairman is appointed for a five-year term by the President and is confirmed by the Senate. The Chairman presides at meetings of the Council and at each ACUS plenary session, where he or she makes a full report concerning ACUS's affairs since the previous plenary session. During the absence, incapacity, or vacancy of the office, the Vice Chairman serves as Chairman. The position of Chairman is currently vacant. Matthew L. Wiener currently serves as Vice Chairman.

#### **The Council**

The Council is composed of the Chairman and up to ten government officials and private citizens appointed by the President for three-year terms. Federal officials may constitute no more than one-half of the total Council membership. The Council is responsible for calling plenary sessions and approving their agendas, proposing bylaws and regulations for adoption by the Assembly, reviewing budgetary proposals, and approving the appointment of public members and the initiation of research studies.

#### **Current ACUS Council (as of January 2020)**

- Matthew L. Wiener (Vice Chairman)
- Ronald A. Cass
- Jeffrey M. Harris
- Nicholas T. Matich
- Donald F. McGahn II
- Michael H. McGinley
- Theodore B. Olson

- Jane C. Sherburne
- Geovette E. Washington

### **Government Members**

Government members come from federal executive departments, agencies, independent regulatory boards, and commissions.

### **Public Members**

Public members come from the private sector, including academia, the practicing bar, industry, and public interest organizations.

### **Non-Voting Members**

#### **Liaison Representatives**

The Chairman, with the approval of the Council, may enter into liaison arrangements with federal agencies, congressional committees, and other organizations that do not have voting members of the Conference. Agencies or organizations so designated appoint their liaison representative. Currently, ACUS maintains liaison relationships with several congressional committees.

#### **Senior Fellows**

Senior fellows include former ACUS Chairmen and former ACUS members who completed six years of service or served in the federal judiciary. Senior fellows are appointed by the Chairman with the approval of the Council. Senior fellows serve for two-year terms and may be reappointed.

#### **Special Counsels**

Special Counsels are appointed by the Chairman, with the approval of the Council. They advise and assist the membership in the areas of their special expertise. They serve for two-year terms and may be reappointed.

A roster of the ACUS membership is available at <https://www.acus.gov/about-members>.

### **C. Staff and Office of the Chairman**

ACUS has a small, full-time, career staff that serves under the Chairman. The staff conducts research, supports the work of Conference committees, organizes Conference events, works to implement Conference recommendations, provides information to Conference members and to the public, and otherwise carries forward the work of the Conference. The staff, together with the Chairman, attend to the day-to-day activities of the Conference through the Office of the Chairman.

A roster of the ACUS staff is available at <https://www.acus.gov/about-staff>.

## **D. Program Description**

The main statutory function of ACUS is to bring together the public and private sectors to recommend improvements to administrative and regulatory processes. The Assembly typically meets semi-annually in plenary session to debate, amend, and formally adopt recommendations, which ACUS implements.

In addition to issuing formal recommendations, ACUS performs other statutory functions, most of them through the staff of its Office of the Chairman rather than through the Assembly. They include collecting information and statistics from agencies for analysis and dissemination; publishing reports, sourcebooks, and other materials that may be useful for evaluating and improving administrative processes; preparing reports for Congress; providing technical advice to members of Congress, their staffs, and federal agencies, whether informally or through formal reports; facilitating interchange of information among departments and agencies on matters of administrative procedure; conducting training sessions for federal agencies; and holding public forums, sometimes with other entities, to address matters of public interest. These forums often lead to the implementation of best practices at agencies.

## **III. Strategic Goals and Notable Activities**

### **A. Strategic Goals**

To set priorities for the selection of projects, ACUS developed the following mission statement, strategic goals, and vision and values:

#### *ACUS Mission Statement*

ACUS brings together experts from the public and private sector to advise the President, Congress, federal agencies, and the federal judiciary. These experts collaborate to design recommendations seeking to maximize fairness and efficiency in the administration of government programs.

#### *ACUS Strategic Goals*

**Participation:** ACUS will expand citizen participation in the regulatory process through increased use of interactive communications technologies and creative means of outreach, in order to provide essential information to government officials and to inform the public.

**Collaboration:** ACUS will study and promote the most responsive and efficient means of sharing authority and responsibility among the federal government, state, and local governments, contractors, grantees, and citizens. This will include exploration of new models of collaborative

governance as well as a more effective division of responsibility between government and the private sector.

**Innovation:** ACUS will seek new ideas that advance the core values of fairness and efficiency and will study existing government programs to identify what works, what doesn't, and what's promising. Research will address the use of science, ensuring data quality, and performance evaluation.

**Education:** ACUS will bring together senior federal officials and outside experts to identify best practices and will advise agencies on revising their rulemaking and hearing processes, technology, and management systems to deliver better results. ACUS will be a central resource for agencies by compiling and publishing data and guidance on solving mutual problems.

### *ACUS Vision and Values*

ACUS is given the power to “study the *efficiency, adequacy, and fairness* of administrative procedure.” 5 U.S.C. § 594 (emphasis added).

The work of the Conference is guided by these procedural values, which reflect legal and social science measures of performance.

The *fairness* value derives from law and employs principles embedded in the Administrative Procedure Act and the Due Process Clause of the Constitution's Fifth Amendment.

The *efficiency* value derives from economics and looks at how procedures employed by agencies achieve the public purposes the regulations are intended to serve. The question is whether the agency procedures and management techniques reflect optimum resource allocations, not whether the benefits of the underlying substantive regulations exceed their costs.

The *adequacy* value borrows from the disciplines of psychology and political science and looks at the effectiveness of regulatory techniques from the public's perspective, including such factors as trust, transparency, and participation.

## **B. Notable Activities**

### **1. Recently Adopted Recommendations**

The Assembly adopted the following recommendations during calendar year 2019:

- **Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*** identifies ways agencies can offer the public the opportunity to propose alternative approaches to those presented in an interpretive rule and to encourage, when appropriate, public participation in the adoption or modification of interpretive rules. It largely extends the best practices for statements of policy adopted in Recommendation 2017-5, *Agency*

*Guidance Through Policy Statements*, to interpretive rules, with appropriate modifications to account for differences between interpretive rules and policy statements.

- **Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*** addresses the processes and procedures agencies should establish for exercising their authority under Executive Order 13,843 (2018) to hire administrative law judges (ALJs). It encourages agencies to advertise ALJ positions in order to reach a wide pool of applicants, to publish minimum qualifications and selection criteria for ALJ hiring, and to develop policies for the review of ALJ applications.
- **Recommendation 2019-3, *Public Availability of Agency Guidance Documents*** offers best practices for promoting widespread availability of guidance documents on agency websites. It urges agencies to develop and disseminate internal policies for publishing, tracking, and obtaining input on guidance documents; post guidance documents online in a manner that facilitates public access; and undertake affirmative outreach to notify members of the public about new or updated guidance documents.
- **Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*** revises the Conference’s 1986 model agency procedural rules for addressing claims under the Act, which provides for the award of attorney fees to individuals and small businesses that prevail against the government in certain agency adjudications. The revisions reflect, among other things, changes in law and agency practice since 1986.
- **Recommendation 2019-5, *Agency Economists*** addresses the placement of economists within rule-writing agencies (e.g., centralized versus dispersed throughout the agency) and describes methods for promoting high-quality economic analysis within each of the potential organizational structures. Each potential structure has strengths and weaknesses that can affect the flow of information between economists and decision makers. The recommendation does not endorse any one organizational structure over another, but identifies steps agencies can take to remove structural barriers that can impede the communication of objective, consistent, and high-quality economic analysis to decision makers during the rulemaking process.
- **Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*** addresses agency adjudicators’ increasing reliance on their own factual research—especially internet research—when conducting hearings and deciding cases. Though such independent research can be an efficient means to acquire facts, it can also raise concerns regarding the accuracy of information uncovered and fairness to the litigants. The recommendation encourages agencies to develop publicly available policies on independent research that identify sources of information that are reliable in all cases, set forth standards for adjudicators to apply when assessing the reliability of other sources, and ensure that litigants have ready access to all sources.
- **Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*** offers agencies best practices for promoting greater transparency and compliance with the

Federal Vacancies Reform Act of 1998 when a Senate-confirmed position sits vacant. It also addresses the use of delegations of authority in response to staffing vacancies. It urges agencies to determine whether they are subject to the Vacancies Act and, if so, establish compliance processes; improve transparency by disclosing on their websites information about acting officials and delegations of authority; and provide additional support and training to agency officials responsible for Vacancies Act compliance.

- **Recommendation 2019-8, *Public Identification of Agency Officials*** promotes the public availability of real-time information about high-level officials leading federal agencies. It encourages agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials. It also recommends that the Office of Personnel Management regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.
- **Recommendation 2019-9, *Recruiting and Hiring Agency Attorneys*** urges agencies to avail themselves of the flexibilities available to them when hiring attorneys and offers best practices for structuring their hiring processes. First, it suggests that the Office of Personnel Management offer training for agencies on the alternative processes and flexibilities available to them when they hire attorneys. Then, among other suggestions, it advises agencies to post and disseminate vacancy announcements widely when seeking broad applicant pools, draft announcements clearly and concisely, communicate to applicants any limitations on the number of applicants they will consider, and establish policies for reviewing applications and interviewing candidates.

A full listing of adopted ACUS recommendations and statements is provided at <https://www.acus.gov/recommendations/current-recommendations-2010-present>.

## 2. Recent Sourcebooks, Guides, and Reports

As noted above, ACUS not only adopts recommendation through its membership at semi-annual plenary sessions but also engages in other activities in furtherance of its mission through the activities of its Office of the Chairman. Notable among them are reports to improve procedures at specific agencies; widely disseminated publications for the benefit of officials in all three branches and the public; and working groups to identify solutions to common challenges. Recent initiatives include:

- ***Federal Administrative Procedure Sourcebook***. In February 2019, ACUS launched a continuously updated electronic edition of the *Federal Administrative Procedure Sourcebook*. The *Sourcebook*, a joint initiative with the Section of Administrative Law and Regulatory Practice of the American Bar Association, is an annotated compilation of the key legal sources—including the Administrative Procedure Act, the Freedom of Information Act, the Congressional Review Act, and executive orders—governing nearly every aspect of administrative procedure. The electronic edition provides ready access to many of the valuable sources highlighted in the *Sourcebook* and will be updated with

significant developments, including statutory amendments and executive orders, and additional government documents, articles, and other sources as they become available.

- ***Federal Administrative Adjudication Outside the Administrative Procedure Act.*** In September 2019, ACUS published this sourcebook examining federal administrative adjudication that is not subject to the adjudicatory provisions of the Administrative Procedure Act (i.e., non-APA adjudication). It provides a comprehensive overview and cross-cutting analysis of non-APA adjudication, and examines, among other things, the structure of the initial adjudication and any appeals; pre-hearing, hearing, and post-hearing procedures; the types of adjudicators used; and the case loads at individual agencies. It relies in part on case studies to flesh out the overarching findings.
- ***Revised Model Rules for Implementation of the Equal Access to Justice Act.*** In 2019, ACUS published the *Revised Model Rules for Implementation of the Equal Access to Justice Act* on its website and provided notice of their availability in the *Federal Register* (84 Fed. Reg. 38,934 (Aug. 8, 2019)). The updated *Rules* implement ACUS's statutory charge to advise agencies in establishing "uniform procedures for the submission and consideration of applications for an award of fees and other expenses" under the Equal Access to Justice Act (EAJA) in light of amendments to EAJA made since 1986 and evolving adjudicative practices since that time.
- ***Sourcebook of United States Executive Agencies.*** In December 2018, ACUS published a second and substantially expanded edition of its *Sourcebook of United States Executive Agencies*. The *Sourcebook* examines the diverse characteristics of the departments, agencies, and other organizational entities that comprise the federal executive establishment and catalogs a comprehensive set of characteristics for each entity, including structure (e.g., commission or single-head agency, internal organization), personnel (e.g., number and types of appointed positions, limitations on removal), decision-making processes and requirements, political oversight, and sources of funding. Congress, federal agencies, and the federal courts have relied extensively on the *Sourcebook*.
- ***Guide to Legal Issues Encountered in Public-Private Partnerships.*** ACUS convened senior federal officials from 21 agencies who actively work on public-private partnerships (P3s). The working group collaboratively drafted the *Guide to Legal Issues Encountered in Public-Private Partnerships (Guide)*. The *Guide* is, as its title indicates, centered on the major legal issues that agencies will likely encounter as they participate in P3s. It also offers a definition of P3s; briefly discusses a previous interagency effort regarding P3s; highlights activities that agencies often undertake as part of P3s; and provides examples of specific P3s. In addition, it discusses issues pertaining to agencies' vetting of potential private partners. In 2019, the State Department circulated the *Guide* to their Interagency Working Group on Public Private Partnerships.
- ***Model Adjudication Rules (revised).*** In 2018, ACUS published final revised *Model Adjudication Rules* on its website and provided notice of their availability in the *Federal Register* (83 Fed. Reg. 49,530 (Oct. 2, 2018)). The *Rules* are intended for use by all

Federal agencies when designing new, and revising existing, procedural rules governing agency adjudications that involve a trial-type hearing that offers an opportunity for fact-finding before an adjudicator. A working group of esteemed experts from inside and outside the government revised an earlier version of the *Model Adjudication Rules*, which were first published in 1993, to reflect significant changes in adjudicative practices and procedures. The working group relied on ACUS's extensive empirical research of adjudicative practices reflected in the *Federal Administrative Adjudication Database* and input from agency officials, academics, practitioners, and other stakeholders.

- ***Federal Court Review of SSA Disability Adjudication.*** SSA engaged ACUS to conduct an independent study of federal court review in Social Security Disability Insurance and Supplemental Security Income cases. The project consultants conducted an extensive study of federal district court cases reviewing SSA's disability decisions and of SSA's internal quality control procedures, identifying causes for the high rates of remand or reversal by federal courts. Their report offers recommendations to SSA for targeted reforms aimed at reducing the reversal rate. It also recommends reforms to the Federal Rules of Civil Procedure to account for the unique nature of SSA disability appeals in the district courts. That report underlies Recommendation 2016-3, which the Judicial Conference is now considering through a special committee that has drafted a proposed rule change
- ***Social Security Administration: Symptom Evaluation in Disability Determinations.*** At the request of SSA, ACUS's Office of the Chairman prepared an independent study that reviewed and analyzed SSA's laws, regulations, policies, and practices concerning evaluation of claimants' symptoms in the adjudication of social security disability claims. The report advised SSA on how to best articulate the scope of symptom evaluation in its adjudication process, to improve consistency in disability determinations, reduce complaints of bias and misconduct against SSA adjudicators, and lessen the frequency of remands attributable to credibility evaluation. In March 2016, SSA adopted the report's recommendations when it issued Social Security Ruling 16-3p.

### 3. Projects Underway

ACUS issues about ten recommendations each year, and at any one time has about a dozen ongoing research projects. A listing and summary of projects actively under study and expected to lead to recommendations, reports, or publications in FY 2019 or FY 2020 follows. A full listing of active ACUS projects and related documents is available at <https://www.acus.gov/current-projects>.

#### *Congressionally Mandated Reports*

- ***Open Book on Equal Access to Justice.*** In March 2019, the President signed into law the bipartisan "John D. Dingell, Jr. Conservation, Management, and Recreation Act." Section 4201 places statutory responsibility in ACUS to maintain a database on attorneys' fees awards under the Equal Access to Justice Act and report annually to Congress. Under EAJA, federal agencies must reimburse private litigants for their attorneys' fees when

they prevail against agencies in certain adjudications and federal court cases to which the agency is a party. ACUS is currently developing the publicly accessible database, is working with agencies to collect EAJA award information, and is prepared to submit its initial report to Congress by March 31, 2020.

- ***Social Security Administration Representative Payee Program: Information Sharing with States.*** In April 2018, the President signed into law the “Strengthening Protections for Social Security Beneficiaries Act of 2018” following its unanimous passage in both the United States Senate and House of Representatives. Among other provisions, this law calls for a report from ACUS on information sharing between SSA and state courts and agencies regarding individuals who receive and manage benefits on behalf of beneficiaries, known as representative payees. Better information sharing between the SSA and states regarding representative payees will lead to greater protections for vulnerable social Security beneficiaries. This report, currently underway and due to Congress by June 30, 2020, examines the potential opportunities, barriers, and risks of information sharing regarding representative payees and explores how enhanced information sharing would be implemented.

*Selected Projects Anticipated to Result in Assembly-Adopted Recommendations*

- ***Agency Appellate Systems*** examines agencies’ appellate review of hearing-level adjudicative decisions. Topics include the structure, composition, functions, procedures, and authority of agency appellate bodies. Resulting recommendations will focus on the ways in which agencies can enhance both the efficiency and fairness of appellate review.
- ***Agency Bid Protests*** studies agency-level bid protest procedures under the Federal Acquisition Regulation and agency-specific regulations. It analyzes agency-specific regulations governing a variety of bid protest procedures, including higher-level agency review, insertion of clauses regarding protest procedures in solicitations, and discovery and exchange of information during protests. The project will offer a series of options for agency-level bid protest procedures and recommendations regarding when specific procedures may be appropriate for adoption.
- ***Protected Materials in Public Rulemaking Dockets*** examines how agencies protect confidential business information, such as trade secrets and financial regulatory information, and personally identifiable information, such as medical information, within their public rulemaking dockets, while achieving an appropriate level of disclosure. Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, urged agencies to seek “maximum disclosure” in the public rulemaking docket but did not address precisely how agencies should safeguard protected materials that underlie proposed rules. This project builds on Recommendation 2013-4 by studying practices agencies use to balance transparency and confidentiality in rulemaking, such as disclosing aggregate data without compromising the underlying information’s confidentiality and redacting protected information.

- ***Rules on Rulemakings*** addresses whether and when agencies should adopt rules setting forth the procedures the agencies follow when issuing rules. These procedures can include internal approval requirements for proposed rules. They also can cover various aspects of the rulemaking process throughout the lifecycle of the rule, from initiating a new rule (e.g., petitions for rulemaking) to reassessing existing rules (e.g., retrospective review). The project will not seek to dictate the precise types of rulemaking procedures agencies should adopt, but it will explore the potential benefits and costs of a single rule or set of rules that set forth an agency’s rulemaking practices.
- ***Agency Litigation Webpages*** studies whether and how agencies should make their federal court filings available to the public on their websites. Particular emphasis will be placed on litigation dealing with agency regulatory programs. It will consider how those filings should be posted to optimize accessibility, will explore steps agencies can take to promote public access to their filings, and will consider how best to utilize limited agency resources in making these filings public.

*Forthcoming Publications of the Office of the Chairman*

- ***Artificial Intelligence in Federal Agencies.*** Putting ACUS at the forefront of agency efforts to implement Executive Order 13,859, *Maintaining American Leadership in Artificial Intelligence* (2019), this project studies the current state of artificial intelligence (AI) usage within the federal government and examines the potential for increased government usage of AI tools in rulemaking, enforcement, and adjudication. One report, written by a team of leading researchers at Stanford Law School and New York University School of Law, will map how federal agencies are currently using AI to make and support decisions. A second report, by an administrative law expert from the University of Pennsylvania Law School, will discuss potential uses of AI in federal agencies (such as in areas in which artificial intelligence programs might yield more accurate and fair results than a human decision maker), and will address how agencies can ensure that they protect due process as they adopt these cutting-edge technologies, consistent with the President’s focus on developing AI with American values.
- ***Classification of Agency Guidance.*** This project will develop a classification system to catalog the wide array of guidance agencies issue, which can range from the relatively formal (e.g., policy manuals) to the very informal (e.g., phone calls). It will also identify considerations and circumstances that lead agencies to use one type of guidance instead of another. The project will produce a guide that sets forth a classification scheme and examines how agencies use the many different forms of guidance available to them. The guide will be valuable to agencies, Congress, the courts, and the public in better understanding the role of agency guidance in the interpretation and administration of statutes and regulations.
- ***Guide to Judicial Review of Federal Administrative Action.*** This project catalogs all provisions in the United States Code that govern federal judicial review of agency action. Topics include the availability of review, choice of court, administrative exhaustion,

limitations periods, and the scope and standard of review. The project will result in a guide for use by Congress, the judiciary, agencies, and the public.

- ***Summary of Recent Administrative Law Reform Bills.*** Members of Congress from both political parties have introduced a large number of bills designed to amend or overhaul certain aspects of the federal administrative state. Given the significance of these proposed reforms and the large number of bills introduced, the Office of the Chairman of the Administrative Conference felt that it would be useful to compile a list of bills introduced in the last several years. The Office of the Chairman updates this document periodically to introduce new bills and to reflect subsequent developments for existing bills.
- ***Working Group on Compiling Administrative Records.*** In Recommendation 2013-4, *Administrative Record in Informal Rulemaking*, ACUS offered best practices for preserving, compiling, and certifying records for judicial review of informal rulemaking. This Working Group brings together representatives from the public and private sectors to develop materials—addressing a wide range of legal, policy, technological, organizational, and personnel matters—that agencies can easily adapt for their own needs when implementing Recommendation 2013-4.

A principal program activity for ACUS in FY 2020-21 will include necessary follow up on, or continuation of, these research projects and programs; implementation of any recommendations resulting from them; and the initiation of other projects in furtherance of ACUS's mission.

#### **4. Collaborative Initiatives Through the Office of the Chairman**

The Office of the Chairman pursues other projects that advance ACUS's statutory mission and strategic goals through forums, symposia, and other events in partnership with other federal agencies as well as non-governmental organizations. Notable recent events include:

- ***Forum on Nationwide Injunctions and Federal Regulatory Programs (February 2020).*** ACUS cosponsored this forum with the George Washington University Law School and American Bar Association's Section of Administrative Law and Regulatory Practice. Deputy Attorney General Jeffrey Rosen provided the keynote address, and panelists—including a circuit court judge and assistant attorney general—discussed the arguments for and against national injunctions, special issues that arise in challenges to federal regulations, and possible judicial and statutory reforms.
- ***Forum on Mass and Fake Comments in Agency Rulemaking (October 2018).*** ACUS cosponsored this forum with the American University *Administrative Law Review*. Dominic J. Mancini, Deputy Administrator of the Office of Information and Regulatory Affairs (OIRA), provided the keynote address. The forum also included several panels consisting of leading academics and agency officials discussing how agencies address mass comments and how the rise of "fake" comments affects the rulemaking process.

- ***Forum on Federal Administrative Adjudication (September 2017)***. ACUS cosponsored a forum on federal administrative adjudication. The forum took place on Capitol Hill with many congressional staff in attendance. Topics included technological innovations in adjudication and balancing fairness and efficiency in high-volume adjudication programs.
- ***Symposium on New Developments in Regulatory Benefit-Cost Analysis (September 2017)***. ACUS cosponsored a symposium on regulatory benefit-cost analysis at George Washington University. Former OIRA Administrators Susan Dudley and Sally Katzen appeared as featured speakers. The event included discussions on tools for evaluating regulatory and deregulatory impacts and on experience using regulatory analysis to implement new directives.
- ***Forum on Regulatory Capture (March 2016)***. ACUS sponsored a forum exploring special interest influence and the administrative state. The event, hosted on the Hill, featured remarks by Senators Sheldon Whitehouse, Mike Lee, and Elizabeth Warren. Topics discussed include whether certain types of regulations are less vulnerable to capture than others and whether deregulation is a solution to the problem of capture or is itself evidence of capture.

## **5. Assistance to Congress and Federal Agencies by the Office of the Chairman**

- ***Individualized Advice***. Congressional staff of both chambers of Congress and of both political parties often request technical assistance from ACUS. The Office of the Chairman frequently provides background information, technical legislative drafting assistance, and other non-partisan, technical advice to Hill staff.
- ***Congressional Trainings***. ACUS has offered trainings to congressional staff on a variety of topics, including legislative drafting involving delegation of power to administrative agencies.
- ***Council of Independent Regulatory Agencies***. The Office of the Chairman convenes the Council of Independent Regulatory Agencies. A council for leaders in independent regulatory agencies, CIRA's goal is to provide a forum to discuss issues common to these agencies.
- ***Interagency Roundtable***. The Office of the Chairman convenes the Interagency Roundtable. Similar to CIRA (above), the purpose of the Roundtable is for executive and independent agencies to discuss legal and policy issues with wide effect.
- ***Statutory Review Program***. ACUS has initiated a program under which its staff will transmit to Congress (through its legislative counsel offices) federal judicial opinions that identify technical and related problems in statutes dealing with administrative procedure. Its primary purpose is to provide legislative drafters with the information they need to ensure future statutes adequately reflect Congress's intent. Opinions are selected by Conference staff based on independent research and, most importantly, suggestions from federal agencies.

#### IV. Budget Status and Request

##### A. Proposed Appropriations Language for FY 2021

###### Administrative Conference of the United States

###### Salaries and Expenses

*For necessary expenses of the Administrative Conference of the United States, authorized by 5 U.S.C. §§ 591 et seq., \$3,500,000 to remain available until September 30, 2022, of which not to exceed \$1,000 is for official reception and representation expenses.*

##### B. Budget Authority and Staffing by Activity

###### Salaries and Expenses

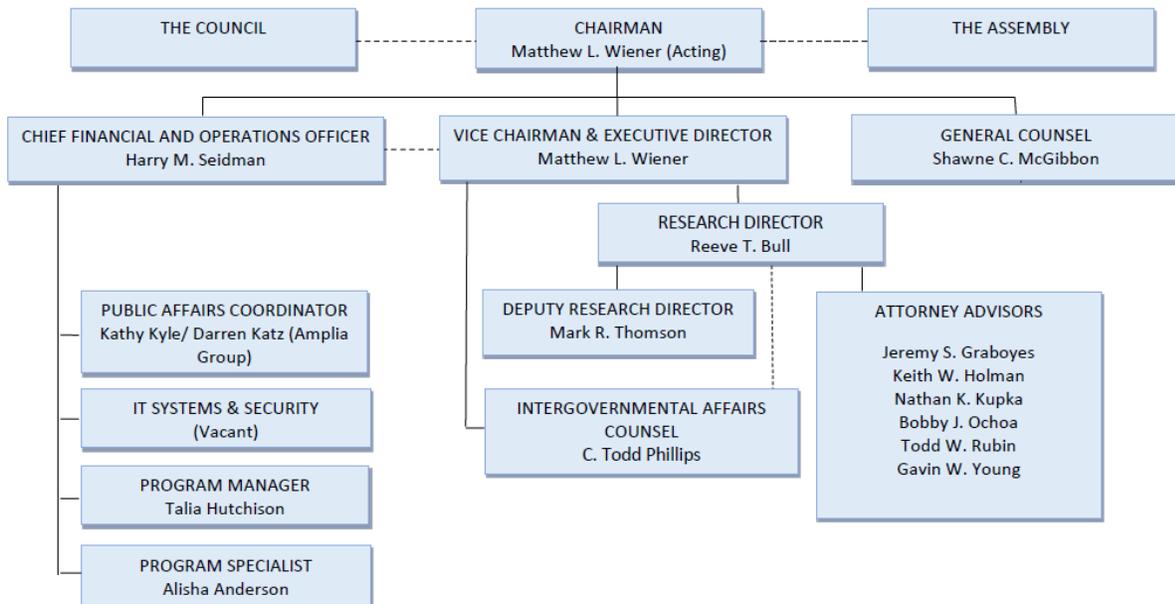
	FY 2017 Enacted	FY 2018 Enacted	FY 2019 Enacted	FY 2020 Enacted	FY 2021 Requested
Budget Authority	\$3,100,000*	\$3,100,000*	\$3,100,000*	\$3,250,000	\$3,500,000
Authorized FTE	18	18	18	18	18
Filled FTE	15	15	15	15	16

\*FY 2017-19 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

**C. ACUS Organization Chart**  
 Current as of January 2020



**ADMINISTRATIVE CONFERENCE OF THE UNITED STATES  
 (ACUS)**



UPDATED January 2020

#### D. Financial Summary

	<b>FY 2019 OBLIGATIONS ACTUAL</b>	<b>FY 2020 CURRENT BUDGET</b>	<b>FY 2021 PROPOSED BUDGET</b>
Appropriation	\$3,100,000	\$3,250,000	\$3,500,000
Carry Forward	\$204,197	\$87,127	\$0
Sequestration	\$0	\$0	\$0
<b>Net Appropriation</b>	<b>\$3,304,197</b>	<b>\$3,337,127</b>	<b>\$3,500,000</b>
<i><b>Obligations/Expenses</b></i>			
Salaries, Full Time	\$1,560,398	\$1,750,000	\$1,750,000
<u>Benefits</u>	<u>\$450,337</u>	<u>\$415,000</u>	<u>\$482,000</u>
<i><b>Subtotal, Salaries and Benefits</b></i>	<b>\$2,010,735</b>	<b>\$2,165,000</b>	<b>\$2,232,000</b>
Member/ Staff Travel	\$49,959	\$15,000	\$20,000
Rent & Utilities	\$461,675	\$490,000	\$490,000
Communications/ IT	\$33,988	\$20,000	\$20,000
Printing/Reproduction	\$11,969	\$15,000	\$20,000
Contract Office Personnel	\$122,400	\$87,127	\$133,000
Consultant Contracts (Research & Projects)	\$309,047	\$270,000	\$300,000
Administrative Contracts	\$166,875	\$110,000	\$115,000
Supplies	\$23,408	\$15,000	\$20,000
EAJA Database (Congressional Mandate)	\$26,908	\$150,000	\$150,000
Equipment	\$0	\$0	\$0
<i><b>Subtotal, Operating expenses</b></i>	<b>\$1,206,229</b>	<b>\$1,172,127</b>	<b>\$1,268,000</b>
<b>Total Obligation/Expenses</b>	<b>\$3,216,964</b>	<b>\$3,337,127</b>	<b>\$3,500,000</b>
<b>Unexpended Prior Year Funds</b>	<b>\$106</b>		
Unobligated Balance Brought Forward	\$87,127	\$0	\$0

## E. Recent Appropriations History

<u>Salaries and Expense Account</u> (Amounts in thousands of dollars)	
<u>Fiscal Year</u>	<u>Budget Authority</u>
2017	3,100*
2018	3,100*
2019	3,100*
2020	3,250
2021	3,500 (President's FY '21 Budget)

\*FY 2017-19 appropriations assumed carryover funds for total budgetary resources of \$3.2 million.

ACUS requests \$3.5 million, including two-year spending authority, to support a full year of agency operations during FY 2021. This request is an increase of \$250,000 over the agency's \$3.25 million FY 2020 appropriation. The increased appropriation will fund the personnel and IT infrastructure required for ACUS to comply with its annual *Equal Access to Justice Act* (EAJA)-related data call and reporting mandates established by S. 47, *the Natural Resources Management Act* (signed into law March 12, 2019) and as described elsewhere in this justification.

Since 2010, Congress has consistently appropriated funding for ACUS at a level equal to, or more than, \$3.2 million in total budgetary resources once prior year carryover funds are added. And, Congress has consistently given ACUS two-year funding authority. Tight control of agency expenditures has allowed ACUS to utilize its two-year funding authority to carryover small balances from one fiscal year to the next. This authority is necessary to maintain optimal spending efficiency given the nature of ACUS's work and the agency's small size. The enacted FY 2020 appropriation is the first funding increase for ACUS since its 2010 reestablishment.

ACUS's recent budgetary history is as follows:

For FY 2017, the President's budget requested \$3.2 million to support a full year of agency operations. The Consolidated Appropriations Act of 2017 (Public Law 115-31) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2018, the President's budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2018 (Public Law 115-141) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2019, the President's budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2019 (Public Law 116-6) funded ACUS at \$3.1 million and provided two-year spending authority.

For FY 2020, the President's budget requested \$3.1 million to support a full year of agency operations. The Consolidated Appropriations Act of 2020 (Public Law 116-93) funded ACUS at \$3.25 million and provided two-year spending authority.

ACUS ended FY 2019, the most recently closed fiscal year, with a carryover balance of \$87,127 due to personnel vacancies in senior-level legal and administrative positions. An appropriation of \$3.5 million would fund ACUS at the level required to cover operating and personnel costs at the current reduced staffing level.

## **F. FY 2021 Request**

### **1. Agency Personnel**

(Object Classes 11 and 12)

For FY 2021, ACUS anticipates a staff of 14 filled FTEs, two filled contract FTEs, and two vacant but authorized FTEs. This includes the Chairman and 13 permanent employees included under Object Class 11. In some past years, ACUS has filled 1-2 of its allotted FTE positions under the *Intergovernmental Personnel Act* or other reimbursable arrangements. ACUS may opt to use these hiring mechanisms for personnel in FY 2021, contingent upon agency needs and the availability of funding.

The ACUS staff supports the 101 voting ACUS Members as well as the approximately 100 other ACUS members who serve in a non-voting capacity.

#### Agency Management

The ACUS Chairman is appointed for a five-year term by the President with the advice and consent of the Senate. Among his or her duties, the Chairman appoints Public Members (with the consent of the Council), initiates and oversees research studies designed to result in ACUS recommendations, and presides at meetings of the Council and plenary sessions. The Chairman also oversees the staff of ACUS and, together with the staff, constitutes the Office of the Chairman. During a vacancy in the office, the Vice Chairman exercises the Chairman's powers. Currently, Matthew L. Wiener serves as ACUS Vice Chairman and acting agency head. The President has not yet nominated a Chairman this Congress.

The Executive Director provides executive leadership, planning, direction, and coordination for all ACUS operations, including recruiting and managing the ACUS legal staff. The Executive Director provides managerial expertise and staff support to the ACUS Chairman and Council in developing the agency's strategic planning and direction and implementing activities essential to ensuring that ACUS continues to meet its statutory mission. The Executive Director assesses the overall effectiveness, efficiency, and productivity of ACUS operations.

The Chief Financial and Operations Officer is responsible for oversight of the agency's budget as well as management of daily operations and management of the agency's administrative and support staff. The position also oversees contracts for external administrative

and operational support services such as payroll, human resources, and accounts payable. The position develops performance standards, financial and organizational staffing plans, and is responsible for the preparation of annual budgetary and administrative reports to Congress and OMB in accordance with applicable legislation and regulations. The Chief Financial and Operations Officer reviews and comments on proposed legislation and may respond to congressional inquiries and requests to ACUS.

The General Counsel serves as the chief legal and ethics officer for ACUS and provides legal advice and counsel to the agency and its staff on a wide variety of legal matters. The General Counsel is responsible for ensuring that ACUS meets all federal legal and regulatory requirements, including compliance with the *Administrative Conference Act* and the *Federal Advisory Committee Act*, which govern operations of the ACUS Assembly and its committees, as well as all other federal statutes governing the operation of executive branch agencies.

The Research Director is a Senior Attorney responsible for directing the activities of attorney advisors in developing new research projects and managing existing projects. This includes working in conjunction with agency leadership in developing the agency's policy recommendations, keeping abreast of issues and developments in administrative law and practice, and identifying and prioritizing issues to be studied.

#### Legal Staff

Attorney Advisors comprise the bulk of the agency's professional staff. Among other things, they are responsible for managing the work of committees in their development of recommendations for consideration by the full membership of ACUS. This includes reviewing research studies for projects assigned to the committees, assisting the committees in drafting proposed recommendations, responding to requests for information about committee activities, reviewing and summarizing public comments and, in general, providing procedural and legal oversight for the work of the committees. Staff attorneys also serve as in-house researchers on select projects in lieu of outside consultants, research and draft reports of the Office of the Chairman, and participate in the implementation of ACUS recommendations.

#### Administrative and Support Staff

The ACUS staff includes an Information Technology Specialist to support both internal and external communications, including technical support, website development and maintenance, network management, and IT security. This position is also responsible for preparation and submission of IT-related reporting requirements, such as FISMA compliance.

The Communications Director is responsible for developing and managing the agency's strategic communications program, which includes media relations, digital outreach, marketing, and special events. The Communications Director also creates communications materials about the agency's work that are comprehensible to journalists, Congressional members and staff, and other stakeholders. In recent years, ACUS has experimented with this functional area to determine if communications-related objectives can be delivered at lower cost to the agency. Initial results were encouraging, and, at present, the agency has opted to leave this FTE vacant.

The duties of this position are now vested with the Director of Finance and Operations with discrete portions, such as social media management, contracted out to a third-party vendor.

Finally, a Program Manager and a Program Specialist provide administrative support for the ACUS staff and membership.

ACUS's FY 2021 budget request leaves vacant two allotted FTEs for additional legal and administrative support. As in previous budget requests, these vacancies reduce the agency's total FTE count below the allotted 18. During FY 2021, ACUS anticipates 16 total FTEs while maintaining salaries and benefits close to their current spending level. This will be accomplished by backfilling naturally occurring senior-level vacancies (GS 13/14/15) with more junior-level attorneys (GS 9/11/12). Historically, this approach has worked well in controlling agency personnel costs while providing much-needed capacity for in-house research and project management. Use of personnel contracts rather than permanent staff to fill up to two of the total 16 FTE positions will generate additional savings and staffing-level flexibility.

The FY 2021 request includes a separate line item for "contract office personnel" expected to fill up to two of the allotted FTE positions. The money for this line item was repurposed from object classes 11 and 12. Therefore, the sum of these line items maintains parity with total salary and benefits costs in prior fiscal years.

For FY 2021, ACUS requests a budget of **\$1,750,000** for salary expenses associated with full-time employees (Object Class 11). This amount represents the projected cost for a total of 16 full-time positions, including annual civil service cost-of-living salary increases and grade/step increases. Like all federal civilians in the Washington D.C. area, ACUS GS-employees received a cost-of-living adjustment in January 2020 in accordance with Public Law 116-93.

A total of **\$482,000** is budgeted for personnel benefits during FY 2021 (Object Class 12). Personnel benefits are a direct function of the amount of budgeted salary/wages and inclusive of transit subsidy.

## **2. Research, Consulting, and Professional Services** (Object Class 25)

As discussed in the introductory section above, the research and policy work of ACUS is most frequently pursued through contracts with academics in law, public administration, or other related fields. ACUS's research activities are at the core of the agency's ability to analyze issues and develop proposed recommendations through the ACUS committee consensus process. ACUS uses acquisition procedures that provide high value and low risk to the government. ACUS research contracts are generally competitive, fixed-price contracts with recognized experts in their respective fields.

The typical research contract awarded by ACUS, including expenses for research assistance and consultant travel, is approximately \$25,000. These modest contracts allow the federal government to enlist the expertise of scholars in academia and the private bar, many of

whom would receive research grants or bill private clients at several multiples of the effective hourly rates the government is paying.

In FY 2021, ACUS is requesting **\$300,000** in funding for research contracts (Object Class 25). This funding will allow ACUS to maintain a research program of new projects directed toward ACUS's statutory mission to study and cooperatively seek solutions to issues and problems arising in the administration of federal agency programs. The number of projects is dependent on the funding level, which enables ACUS to pursue the projects described in the performance section above, including projects undertaken at the request of Congress.

To minimize contracting costs, ACUS staff attorneys sometimes conduct in-house research in addition to serving as legal counsel for ACUS committee projects and staffing the numerous projects undertaken by the Office of the Chairman described in this justification. In-house research initiatives have resulted in several ACUS recommendations and significant Office of the Chairman projects for agencies such as SSA, EEOC, CMS, and DHHS. In-house staff research projects and other outreach initiatives, including inter-agency workshops, are included within ACUS's salary and administrative overhead expenses.

In addition to funding for research contracts, ACUS requests **\$115,000** for administrative support contracts. As a small agency, ACUS is required by law and policy to contract with multiple agencies or private vendors for many of the administrative functions typically performed in-house at larger agencies. These contracts cover items such as personnel, payroll, finance, accounting, website hosting, mailing services, and mandated financial auditing. For FY 2021, ACUS requests \$115,000 for external administrative support including the mandated annual agency financial audit (\$29,000). ACUS continuously reviews strategies for contracting administrative support, including using reimbursable services offered by other federal agencies, GSA schedules, and Cloud computing solutions, to find the most cost-effective ways to provide these required and, in some cases, mandated services.

As discussed above in the section on personnel, ACUS has utilized contract positions in past years instead of full time permanent employees to give the agency flexibility to match expertise with current projects and to rotate experts from academia, nonprofits, or other federal agencies to provide fresh and innovative thinking to ACUS. In FY 2021, ACUS anticipates filling as many as two FTE positions with contract personnel. Any contract positions would utilize resources repurposed from other sections of the agency budget, principally object classes 11 and 12. ACUS estimates contract personnel costs of **\$133,000** in FY 2021.

### **3. Support and Infrastructure** (Object Classes 21, 23, 24 and 26)

Travel by ACUS members and staff is budgeted at **\$20,000** for FY 2021 (Object Class 21), a sum that reflects the agency's tight control of travel-related costs. Most of these travel expenses involve the travel of out-of-town ACUS members to Council, committee, and plenary session meetings. ACUS members, other than the Chairman, serve without pay and are only reimbursed for travel and per diem, pursuant to 5 U.S.C § 593(c) and 5 U.S.C § 5703. To the extent practicable, ACUS uses videoconferencing and other virtual hosting technologies to

minimize travel expenses at the committee meetings. In addition, some staff members will travel to conduct research or, as required, participate in various professional meetings and conferences.

ACUS has negotiated a lease to occupy office space at 1120 20th Street, NW, Suite 706 South, Washington, D.C. 20036. Leasing arrangements are coordinated for ACUS through the Building Services Division of the General Services Administration (GSA). During FY 2021 ACUS will be responsible for **\$490,000** in rental payments through its lease, based on estimates set forth in the agency's Occupancy Agreement with GSA (Object Class 23).

ACUS's budget includes an estimated **\$20,000** for electronic communications expenses, including telephone service and website hosting during FY 2020 (Object Class 23). This estimate is based on ACUS's historical usage as well as compliance costs related to mandated security and accessibility requirements for all federal government-owned websites. This estimate also accounts for the natural growth in ACUS's electronic records and online presence that will require incremental scaling-up of data storage and processing capacity. This amount also includes the cost of conference calls for Council and other meetings, which is a much more cost-effective method for conducting interim business than face-to-face meetings.

ACUS has budgeted **\$20,000** in FY 2021 for printing costs (Object Class 24). The majority of this expense, approximately \$15,000, is the cost of printing notices in *The Federal Register* as mandated by the Federal Advisory Committee Act. The remaining balance funds annual and interim reports to Congress and the President, inter-agency reporting requirements, outreach to ACUS members and key stakeholders, and other mandated reports and publications.

ACUS's budget includes **\$20,000** for the purchase of supplies, materials, and legal publications during FY 2021 (Object Class 26). The amount includes supplies for mailing, copying, and ordinary office supplies such as paper, pens, and printer cartridges. Also budgeted are funds for the purchase of computer software, mandated anti-virus protection for the agency's IT network, library materials, and for subscriptions to relevant technical, and policy-oriented publications and online services such as Lexis Nexis.

#### **4. New Statutory Mandate** (Object Class 11, 12 and 25)

President Trump signed S. 47, *the Natural Resources Management Act*, into law on March 12, 2019. The act assigned to ACUS a new statutory responsibility to report and maintain a database on attorneys' fees awards paid out government-wide under the *Equal Access to Justice Act* (EAJA). The Congressional Budget Office (CBO) scored the cost of new personnel and IT infrastructure necessary to comply with the new mandate at \$500,000 to \$1 million in the initial start-up fiscal year and \$500,000 or less annually thereafter. Nonetheless, ACUS intends to fully comply with the new mandate at a much lower cost of approximately \$250,000 per annum. ACUS anticipates spending \$100,000 in salary and benefits (from OC 11 and 12) to support a portion of a GS-13 grade Attorney Advisor necessary to carry out this mandate.

ACUS further requests **\$150,000** (OC 25) to build, operate, and maintain the database and public-facing website for disseminating EAJA award data, as mandated by S. 47. Again,

CBO's estimate for building out and maintaining the required IT infrastructure is significantly higher than this request as ACUS estimates that annual costs of \$150,000 are achievable following the initial ramp-up phase, currently planned for FY 2019-2020, when build out costs are front-loaded. These front-loaded costs are budgeted for FY 2019 and FY 2020. Beginning in FY 2021, ACUS expects that a small annual increase of \$250,000 combined with two-year budget authority will allow the agency to smooth expenditures in out years and permit ACUS to fully comply with this mandate at much lower cost than CBO's scoring estimate.

## **V. Conclusion**

For FY 2021, ACUS submits a budget request of \$3,500,000. This level of funding will allow ACUS to pursue a full program of research projects and other programs aimed at discharging the agency's statutory responsibilities. This level of funding will also allow ACUS to pursue a robust research program that will help improve and reform government procedures. Such reforms will be designed to enhance fairness, efficiency, expedition, and public participation in the work of federal executive branch agencies, given their substantial impact on all sectors of the national economy and on the lives of all citizens.

## **Appendix A: Council Members**

Current as of January 2020

### Matthew L. Wiener (Vice Chairman)

Matthew Lee Wiener is the Vice Chairman and Executive Director of the Administrative Conference of the United States. Before affiliating with the Conference, he was general counsel to U.S. Senator Arlen Specter, counsel to the U.S. House of Representatives Committee on the Judiciary, a partner at Dechert LLP, and special counsel to Cuneo Gilbert & LaDuca. Mr. Wiener is an elected member of the American Law Institute, a fellow of the American Bar Foundation, a lecturer in law at the University of Pennsylvania Law School, and the co-chair of the Adjudication Committee of the American Bar Association's Section of Administrative Law and Regulatory Practice. He holds a J.D. from Stanford Law School, where he was articles editor of the *Stanford Law Review*, and an A.B. from William and Mary.

### Ronald A. Cass

Ronald A. Cass has been the President of Cass & Associates since 2004. He is also Dean Emeritus of Boston University School of Law where he served as Dean from 1990-2004. Cass was a law professor at the University of Virginia School of Law from 1976-1981 and at Boston University from 1981-2004. Outside of his professional activities, he has also served as Vice Chairman of the U.S. International Trade Commission (1988-1990), U.S. Representative to the World Bank Panel of Conciliators (2009-Present), advisor to the American Law Institute, Chairman of the Federalist Society Practice Group on Administrative Law, Past Chair of the American Bar Association Administrative Law Section, and President of the American Law Deans Association. Cass received his B.A. with high distinction from the University of Virginia and J.D. with honors from the University of Chicago Law School in 1973.

### Jeffrey M. Harris

Mr. Harris is an experienced litigator who focuses on constitutional, appellate, and regulatory matters. In 2015, he was named to the Legal Times list of "D.C.'s Rising Stars," which identified "some of the most accomplished young attorneys in the D.C. area." Mr. Harris previously served as Associate Administrator of the Office of Information and Regulatory Affairs (OIRA). In that role, he was second in charge of the 50-person office within the Executive Office of the President that reviews all significant federal regulatory actions and coordinates regulatory policy across the federal government.

### Nicholas T. Matich

Nicholas Matich currently serves as Deputy General Counsel at the Office of Management and Budget (OMB) within the Executive Office of the President. In this role, he supervises OMB's legal review of significant regulatory actions by federal agencies under Executive Order 12866 and works on issues of regulatory policy. Mr. Matich also oversees OMB attorneys advising on the full range of other legal issues affecting the agency. Before joining OMB, Mr. Matich worked in the White House as Special Assistant to the President and

Associate Staff Secretary, where he coordinated the vetting of executive orders, speeches, legislation, signing statements, memoranda, and other documents for the President. Prior to entering government service, Mr. Matich worked in private practice at Williams & Connolly LLP and Bancroft PLLC (now part of Kirkland & Ellis LLP) on trial and appellate litigation matters. Immediately after law school, Mr. Matich served as a law clerk for the Honorable Richard C. Wesley of the United States Court of Appeals for the Second Circuit. Mr. Matich earned his bachelor's degree summa cum laude from the University of Notre Dame and his law degree from the University of Virginia School of Law, where he was a Senior Editor on the *Virginia Law Review*.

#### Donald F. McGahn II

Donald F. McGahn II is the U.S. Practice Leader of global law firm Jones Day's Government Regulation Practice in Washington D.C. focused on representing clients before government agencies in enforcement matters and in court disputes arising from government regulation or action. Immediately prior to joining Jones Day, Mr. McGahn served as White House Counsel, advising the President of the United States on all policy, legislative, and regulatory matters.

#### Michael H. McGinley

Michael H. McGinley focuses his practice on litigation, specifically appellate and complex commercial matters. Mr. McGinley has experience representing clients at every level of the federal judiciary, as well as in numerous federal agencies and state courts. He has litigated a wide range of issues, including federal jurisdiction, foreign sovereign immunity, Chevron deference, federalism, preemption, arbitration, labor law, tort law, securities and corporate law, contract rights, voting rights, free speech, religious freedom and many other constitutional issues. Mr. McGinley also regularly advises individual, corporate and government clients on strategic and regulatory matters.

#### Theodore B. Olson

Theodore B. Olson is a partner in Gibson, Dunn & Crutcher's Washington, D.C. office and a member of the firm's Executive Committee, Co-Chair of the Appellate and Constitutional Law Group and the firm's Crisis Management Team. Previously, he served as the 42nd Solicitor General of the United States from 2001-2004. Mr. Olson also served as Assistant Attorney General for the Office of Legal Counsel from 1981 to 1984. Except for those two intervals, he has been a lawyer with Gibson, Dunn & Crutcher in Los Angeles and Washington, D.C. since 1965. Throughout his career, Mr. Olson has argued numerous cases before the Supreme Court of the United States. Mr. Olson is a Fellow of both the American College of Trial Lawyers and the American Academy of Appellate Lawyers. He has written and lectured extensively on appellate advocacy, oral advocacy in the courtroom, and constitutional law. He received his bachelor's degree cum laude from the University of the Pacific in Stockton, California, where he received awards as the outstanding graduating student in both journalism and forensics, and his law degree from the University of California at Berkeley (Boalt Hall), where he was a member of the California Law Review and Order of the Coif.

Jane C. Sherburne

Jane C. Sherburne is the owner of Sherburne PLLC, a legal consulting firm providing strategic advice in crisis environments and in connection with regulatory policy developments. Previously, Sherburne was Senior Executive Vice President and General Counsel of BNY Mellon. She was formerly Senior Executive Vice President and General Counsel of Wachovia Corporation. Before joining Wachovia in mid-2008, she served as Deputy General Counsel and Senior Deputy General Counsel of Citigroup, and General Counsel of Citigroup's Global Consumer Group. Sherburne was previously a Partner at Wilmer, Cutler & Pickering, where she practiced litigation, representing clients in matters requiring crisis management, including matters involving Congressional investigations, internal government and corporate investigations, and complex civil litigation. She has also served as Special Counsel to the President during the Clinton Administration, Chief of Staff and Executive Assistant to the Commissioner of Social Security in the Carter Administration, and as a Legislative Assistant to Congressman Donald Fraser (D-MN). Sherburne is a trustee of the Lawyers' Committee for Civil Rights Under Law and the National Women's Law Center. She is also an executive committee member of the New York City Bar. She received her B.A. and M.S.W. from the University of Minnesota in 1974 and 1976, respectively, and her J.D. from Georgetown University Law Center in 1983.

Geovette E. Washington

Geovette E. Washington is the Senior Vice Chancellor and Chief Legal Officer of the University of Pittsburgh, a position she has held since August 2015. Prior to this role, Ms. Washington served as General Counsel for the Office of Management and Budget from 2013 to 2015. Ms. Washington was first appointed by the President as a Member to the Administrative Conference of the United States in 2013. From 2010 to 2013, Ms. Washington was Deputy General Counsel for the Department of Commerce. Prior to this, she worked at Lewis Baach PLLC (formerly Baach Robinson and Lewis PLLC), as partner from 2000 to 2010 and as an associate from 1996 to 1999. Ms. Washington was a Special Assistant to the Assistant Attorney General in the Office of Legal Counsel at the Department of Justice from 1993 to 1996 and a law clerk for the Honorable Aubrey E. Robinson, Jr. of the U.S. District Court for the District of Columbia from 1992 to 1993. Ms. Washington received a B.A. from Wesleyan College in Macon, Georgia and a J.D. from the Duke University.

## Appendix B: Government Members

The following were government members as of January 31, 2020:

David J. Apol	Office of Government Ethics
Gregory R. Baker	Federal Election Commission
Eric S. Benderson	U.S. Small Business Administration
Ketan D. Bhirud	U.S. Equal Employment Opportunity Commission
Paige Bullard	Federal Energy Regulatory Commission
Daniel Cohen	U.S. Department of Energy
Michael J. Cole	Federal Mine Safety and Health Review Commission
Peter J. Constantine	U.S. Department of Labor
Anika S. Cooper	Surface Transportation Board
Elizabeth H. Dickinson	U.S. Food & Drug Administration
Robert J. Girouard	U.S. Office of Personnel Management
Gina K. Grippando	U.S. International Trade Commission
Richard J. Hipolit	U.S. Department of Veterans Affairs
Janice L. Hoffman	Centers for Medicare & Medicaid Services
Paul S. Koffsky	U.S. Department of Defense
Alice M. Kottmyer	U.S. Department of State
Tristan L. Leavitt	U.S. Merit Systems Protection Board
Hilary Malawer	U.S. Department of Education
Nadine N. Mancini	Occupational Safety & Health Review Commission
Christina E. McDonald	U.S. Department of Homeland Security
Mary E. McLeod	Consumer Financial Protection Bureau
Brian Morrissey	U.S. Department of the Treasury
Jonathan Moss	U.S. Department of Transportation
Patrick R. Nagle	Social Security Administration
Bao Nguyen	Office of the Comptroller of the Currency
Alfred M. Pollard	Federal Housing Finance Agency
Patricia M. Pollitzer	U.S. Consumer Product Safety Commission
Connor N. Raso	U.S. Securities and Exchange Commission
Carrie F. Ricci	U.S. Department of Agriculture
Roxanne L. Rothschild	National Labor Relations Board
Jessica Salmoiraghi	U.S. General Services Administration
Jay R. Schwarz	Board of Governors of the Federal Reserve System
Carol Ann Siciliano	U.S. Environmental Protection Agency
Robert F. Stone	Occupational Safety and Health Administration
Heath P. Tarbert	U.S. Commodity Futures Trading Commission
Stephanie J. Tatham	Office of Management and Budget

Drita Tonuzi	Internal Revenue Service
David A. Trissell	Postal Regulatory Commission
Miriam Vincent	National Archives and Records Administration
Mike Walsh	U.S. Department of Commerce
Beth Ann Williams	U.S. Department of Justice
Kenny A. Wright	Federal Trade Commission
Chin Yoo	Federal Communications Commission
Marian L. Zobler	U.S. Nuclear Regulatory Commission
Vacant	U.S. Consumer Product Safety Commission
Vacant	U.S. Department of Health & Human Services
Vacant	U.S. Department of Housing and Urban Development
Vacant	U.S. Department of the Interior
Vacant	Federal Deposit Insurance Corporation
Vacant	Federal Maritime Commission
Vacant	Office of Science and Technology Policy

### Appendix C: Public Members

The following were public members as January 31, 2020:

Kent H. Barnett	University of Georgia School of Law
Jack M. Beermann	Boston University School of Law
Susan G. Braden	The Office of Judge Susan G. Braden (Ret.) LLC
Emily S. Bremer	University of Notre Dame Law School
Cary Coglianese	University of Pennsylvania Law School
Ilona R. Cohen	Aledade, Inc.
Christopher C. DeMuth	Hudson Institute
John F. Duffy	University of Virginia School of Law
Claire J. Evans	Wiley Rein LLP
Chai R. Feldblum	Morgan Lewis & Bockius LLP
Meredith Fuchs	Capital One Financial Corporation
Erin M. Hawley	University of Missouri Kinder Institute of Constitutional Democracy; Kirkland & Ellis LLP
Kristin E. Hickman	University of Minnesota Law School
Allyson N. Ho	Gibson Dunn & Crutcher LLP
Marc L. Kesselman	Purdue Pharma LP
Richard D. Klingler	Sidley Austin LLP
Renée M. Landers	Suffolk University Law School
Elliott P. Laws	Crowell & Moring LLP

Stephen P. Lehotsky	U.S. Chamber Litigation Center
Michael A. Livermore	University of Virginia School of Law
Blake D. Morant	The George Washington University Law School
Aaron L. Nielson	Brigham Young University J. Reuben Clark Law School
Jennifer Nou	The University of Chicago Law School
Victoria F. Nourse	Georgetown University Law Center
Anne Joseph O'Connell	Stanford Law School
Nicholas R. Parrillo	Yale Law School
Eloise Pasachoff	Georgetown University Law Center
Edith Ramirez	Hogan Lovells LLP
Sidney A. Shapiro	Wake Forest University School of Law
Catherine M. Sharkey	New York University School of Law
Anna Williams Shavers	University of Nebraska-Lincoln College of Law
Kate A. Shaw	Yeshiva University Benjamin N. Cardozo School of Law
Jonathan R. Siegel	The George Washington University Law School
Kevin M. Stack	Vanderbilt Law School
Andrew N. Vollmer	Mercatus Center at George Mason University
Christopher J. Walker	The Ohio State University Michael E. Moritz College of Law
Kathryn A. Watts	University of Washington School of Law
Russell R. Wheeler	The Brookings Institution
Adam J. White	The C. Boyden Gray Center for the Study of the Administrative State, George Mason University Antonin Scalia Law School
Jonathan B. Wiener	Duke University Law School

#### **Appendix D: Liaison Representatives, Senior Fellows, and Special Counsels**

The following were liaison representatives as of January 31, 2020:

Thomas H. Armstrong	Government Accountability Office
Krista Boyd	U.S. House Committee on Oversight and Reform
Ronald S. Flagg	Legal Services Corporation
Daniel M. Flores	U.S. House Committee on the Judiciary, Subcommittee on Antitrust, Commercial and Administrative Law
Claire Green	Social Security Advisory Board
Kristen L. Gustafson	National Oceanic and Atmospheric Administration
Eileen Barkas Hoffman	Federal Mediation & Conciliation Service
Michael E. Horowitz	Council of the Inspectors General on Integrity and Efficiency

Nathan Kaczmarek	The Federalist Society
Yogin Kothari	U.S. Senate Committee on Homeland Security & Governmental Affairs
Daniel S. Liebman	Pension Benefit Guaranty Corporation
Eric R. LoPresti	Office of the National Taxpayer Advocate Service
Randolph M. Lyon	National Academy of Public Administration
H. Alexander Manuel	ABA National Conference of the Administrative Law Judiciary
Charles A. Maresca	U.S. Small Business Administration Office of Advocacy
Thomas P. McCarthy	Federal Administrative Law Judges Conference
Melissa J. McIntosh	Association of Administrative Law Judges
Mary C. McQueen	National Center for State Courts
Stephanie A. Middleton	The American Law Institute
Jeffrey P. Minear	Judicial Conference of the U.S.
Randolph D. Moss	U.S. District Court for the District of Columbia
Rebecca D. Orban	U.S. Coast Guard
Cornelia T.L. Pillard	U.S. Court of Appeals for the District of Columbia Circuit
Katy Rother	U.S. House Committee on Oversight and Reform
Viktoria Z. Seale	Council on Environmental Quality
Kara Stein	American Constitution Society
Max Stier	Partnership for Public Service
Thomas M. Susman	ABA Administrative Law & Regulatory Practice Section
Margaret M. Sweeney	U.S. Court of Federal Claims
Sheryl L. Walter	Administrative Office of the U.S. Courts
David L. Welch	U.S. Federal Labor Relations Authority
Stephen P. Wood	National Highway Traffic Safety Administration
Sara Zdeb	U.S. Senate Committee on the Judiciary (Minority)
Vacant	Federal Aviation Administration
Vacant	National Aeronautics and Space Administration
Vacant	National Transportation Safety Board
Vacant	Office of the Director of National Intelligence
Vacant	Office of the Federal Register
Vacant	Office of the U.S. Trade Representative
Vacant	U.S. Citizenship and Immigration Services
Vacant	U.S. Department of Justice Executive Office for Immigration Review
Vacant	U.S. House Committee on the Judiciary

The following were senior fellows as of January 31, 2020:

Gary D. Bass	The Bauman Foundation
Warren Belmar	Capitol Counsel Group LLC
Jodie Z. Bernstein	Kelley Drye & Warren LLP
Boris Bershteyn	Skadden Arps Slate Meagher & Flom LLP
Marshall J. Breger	The Catholic University Columbus School of Law
Stephen G. Breyer	Supreme Court of the U.S.
Amy P. Bunk	U.S. Department of Homeland Security
James Ming Chen	Michigan State University College of Law
Betty Jo Christian	Steptoe & Johnson LLP
H. Clayton Cook, Jr.	Cook Maritime Finance
John F. Cooney	
Steven P. Croley	Latham & Watkins LLP
Bridget C.E. Dooling	The George Washington University Regulatory Studies Center
Susan E. Dudley	The George Washington University Regulatory Studies Center; The George Washington University Tractenberg School of Public Policy & Public Administration
Neil R. Eisner	
E. Donald Elliott	Covington & Burling LLP; Yale Law School
Cynthia R. Farina	Cornell Law School
Fred F. Fielding	Morgan Lewis & Bockius LLP
Michael A. Fitzpatrick	Google
David C. Frederick	Kellogg Hansen Todd Figel & Frederick PLLC
H. Russell Frisby, Jr.	Stinson LLP
Brian C. Griffin	Clean Energy Systems, Inc.
Susan Tsui Grundmann	U.S. Congress Office of Compliance
Michael E. Herz	Yeshiva University Benjamin N. Cardozo School of Law
Elena Kagan	Supreme Court of the U.S.
Paul D. Kamenar	
John M. Kamensky	IBM Center for The Business of Government
Sally Katzen	New York University School of Law
Robert A. Katzmann	U.S. Court of Appeals for the Second Circuit
Richard J. Leighton	
Robert J. Lesnick	
Ronald M. Levin	Washington University in St. Louis School of Law
Daniel R. Levinson	
Jerry L. Mashaw	Yale Law School
Randolph J. May	The Free State Foundation
Nina A. Mendelson	The University of Michigan Law School
Gillian E. Metzger	Columbia Law School
David M. Michaels, PhD	The George Washington University Milkin Institute School of Public Health

James C. Miller III	King & Spalding LLP
Alan B. Morrison	The George Washington University Law School
David W. Ogden	Wilmer Cutler Pickering Hale and Dorr LLP
Nina E. Olson	Center for Taxpayer Rights
Lee Liberman Otis	The Federalist Society
Sallyanne Payton	The University of Michigan Law School
Richard J. Pierce, Jr.	The George Washington University Law School
S. Jay Plager	U.S. Court of Appeals for the Federal Circuit
Richard L. Revesz	New York University School of Law
Jonathan Rose	Arizona State University Sandra Day O'Connor College of Law
Teresa Wynn Roseborough	The Home Depot
Eugene Scalia	U.S. Department of Labor
Robert F. Schiff	
David C. Shonka	Redgrave LLP
Lon B. Smith	
Loren A. Smith	U.S. Court of Federal Claims
Stanley Sporkin	
Kenneth W. Starr	The Lanier Law Firm
Peter L. Strauss	Columbia Law School
James J. Tozzi	The Center for Regulatory Effectiveness
Paul R. Verkuil	National Academy of Public Administration
John M. Vittone	
David C. Vladeck	Georgetown University Law Center
John M. Walker, Jr.	U.S. Court of Appeals for the Second Circuit
William H. Webster	Milbank LLP
Edward L. Weidenfeld	The Weidenfeld Law Firm, PC
Richard E. Wiley	Wiley Rein LLP
Stephen F. Williams	U.S. Court of Appeals for the District of Columbia Circuit
Allison M. Zieve	Public Citizen Litigation Group

The following were special counsel as of January 31, 2020:

Blake Emerson	UCLA School of Law
Andrew Emery	The Regulatory Group
Jeffrey Lubbers	American University Washington College of Law
David Pritzker	

### **Appendix E: Recommendations and Statements Adopted 2010 – 2019**

- **Recommendation 2019-1, *Agency Guidance Through Interpretive Rules*** identifies ways agencies can offer the public the opportunity to propose alternative approaches to

those presented in an interpretive rule and to encourage, when appropriate, public participation in the adoption or modification of interpretive rules. It largely extends the best practices for statements of policy adopted in Recommendation 2017-5, *Agency Guidance Through Policy Statements*, to interpretive rules, with appropriate modifications to account for differences between interpretive rules and policy statements.

- **Recommendation 2019-2, *Agency Recruitment and Selection of Administrative Law Judges*** addresses the processes and procedures agencies should establish for exercising their authority under Executive Order 13,843 (2018) to hire administrative law judges (ALJs). It encourages agencies to advertise ALJ positions in order to reach a wide pool of applicants, to publish minimum qualifications and selection criteria for ALJ hiring, and to develop policies for the review of ALJ applications.
- **Recommendation 2019-3, *Public Availability of Agency Guidance Documents*** offers best practices for promoting widespread availability of guidance documents on agency websites. It urges agencies to develop and disseminate internal policies for publishing, tracking, and obtaining input on guidance documents; post guidance documents online in a manner that facilitates public access; and undertake affirmative outreach to notify members of the public of new or updated guidance documents.
- **Recommendation 2019-4, *Revised Model Rules for Implementation of the Equal Access to Justice Act*** revises the Conference's 1986 model agency procedural rules for addressing claims under the Act, which provides for the award of attorney fees to individuals and small businesses that prevail against the government in certain agency adjudications. The revisions reflect, among other things, changes in law and agency practice since 1986.
- **Recommendation 2019-5, *Agency Economists*** addresses the placement of economists within rule-writing agencies (e.g., centralized versus dispersed throughout the agency) and describes methods for promoting high-quality economic analysis within each of the potential organizational structures. Each potential structure has strengths and weaknesses that can affect the flow of information between economists and decision makers. The recommendation does not endorse any one organizational structure over another, but identifies steps agencies can take to remove structural barriers that can impede the communication of objective, consistent, and high-quality economic analysis to decision-makers during the rulemaking process.
- **Recommendation 2019-6, *Independent Research by Agency Adjudicators in the Internet Age*** addresses agency adjudicators' increasing reliance on their own factual research—especially internet research—when conducting hearings and deciding cases. Though such independent research can be an efficient means to acquire facts, it can also raise concerns regarding the accuracy of information uncovered and fairness to the litigants. The recommendation encourages agencies to develop publicly available policies on independent research that identify sources of information that are reliable in all cases, set forth standards for adjudicators to apply when assessing the reliability of other sources, and ensure that litigants have ready access to all sources.

- **Recommendation 2019-7, *Acting Agency Officials and Delegations of Authority*** offers agencies best practices for promoting greater transparency and compliance with the Federal Vacancies Reform Act of 1998 when a Senate-confirmed position sits vacant. It also addresses the use of delegations of authority in response to staffing vacancies. It urges agencies to determine whether they are subject to the Vacancies Act and, if so, establish compliance processes; improve transparency by disclosing on their websites information about acting officials and delegations of authority; and provide additional support and training to agency officials responsible for Vacancies Act compliance.
- **Recommendation 2019-8, *Public Identification of Agency Officials*** promotes the public availability of real-time information about high-level officials leading federal agencies. It encourages agencies to publish on their websites basic information about high-level agency leaders and identify vacant leadership positions and acting officials. It also recommends that the Office of Personnel Management regularly publish on its website a list of high-level agency leaders, as well as an archival list of former Senate-confirmed presidential appointees.
- **Recommendation 2019-9, *Recruiting and Hiring Agency Attorneys*** urges agencies to avail themselves of the flexibilities available to them when hiring attorneys and offers best practices for structuring their hiring processes. First, it suggests that the Office of Personnel Management offer training for agencies on the alternative processes and flexibilities available to them when they hire attorneys. Then, among other suggestions, it advises agencies to post and disseminate vacancy announcements widely when seeking broad applicant pools, draft announcements clearly and concisely, communicate to applicants any limitations on the number of applicants they will consider, and establish policies for reviewing applications and interviewing candidates.
- **Recommendation 2018-1, *Paperwork Reduction Act Efficiencies*** encourages collaboration between the Office of Information and Regulatory Affairs and federal agencies to maximize opportunities for making the information collection clearance process under the Paperwork Reduction Act more efficient, while still maintaining its integrity. The recommendation encourages using generic clearances and common forms more frequently, providing more training to agencies, and improving several other aspects of the information collection clearance process.
- **Recommendation 2018-2: *Severability in Agency Rulemaking*** encourages federal agencies that anticipate litigation over their rules to consider early in the rulemaking process whether a rule is severable—that is, divisible into portions that can and should function independently. It also identifies steps agencies should take if they intend that portions of a rule should continue in effect even though other portions have been held unlawful on judicial review. In addition, it encourages courts reviewing an agency rule to solicit the parties’ views on the issue of severability in appropriate circumstances.
- **Recommendation 2018-3, *Electronic Case Management in Federal Administrative Adjudication*** offers guidance for agencies considering whether and how to implement an

electronic case management system. It provides factors for agencies to consider in weighing the costs and benefits of an electronic case management system; sets forth measures an agency should take to ensure privacy, transparency, and security; and describes ways an electronic case management system may improve adjudicatory processes.

- **Recommendation 2018-4, *Recusal Rules for Administrative Adjudicators*** urges agencies to issue procedural regulations governing the recusal of adjudicators to ensure both impartiality and the appearance of impartiality in agency adjudications. It encourages agencies to adopt procedures by which parties can seek the recusal of adjudicators assigned to their cases and to provide written explanations for recusal decisions.
- **Recommendation 2018-5, *Public Availability of Adjudication Rules*** offers best practices to optimize agencies' online presentations of procedural rules governing adjudications. It encourages agencies to make procedural rules for adjudications and related guidance documents available on their websites and to organize those materials in a way that allows both parties appearing before the agencies and members of the public to easily access the documents and understand their legal significance.
- **Recommendation 2018-6, *Improving Access to Regulations.gov's Rulemaking Docket*** offers suggested improvements to Regulations.gov, the website that allows the public to comment on many federal agencies' rulemaking proposals. It provides recommendations to the governing body of Regulations.gov, called the eRulemaking Program, and to agencies that participate in Regulations.gov for ensuring that rulemaking materials on Regulations.gov are easily searchable and categorized consistently and clearly. These recommendations include using one electronic docket per rulemaking, promoting interoperability among key websites (e.g., Federalregister.gov and Reginfo.gov), and making rulemaking materials available to search engines.
- **Recommendation 2018-7, *Public Engagement in Rulemaking*** offers strategies for agencies to enhance public engagement prior to and during informal rulemaking. It encourages agencies to invest resources in a way that maximizes the probability that rulewriters obtain high quality public information as early in the process as possible. It recommends expanding the use of requests for information and advance notices of proposed rulemaking, targeting outreach to individuals who might otherwise be unlikely to participate, and taking advantage of in-person engagement opportunities to solicit stakeholder input and support future informed participation.
- **Recommendation 2018-8, *Public-Private Partnerships*** offers agencies guidance on legal and other considerations for participating in public-private partnerships. It commends to agencies a *Guide to Legal Issues Involved in Public-Private Partnerships at the Federal Level*, which provides guidance on the key legal questions agencies encounter in the operation of public-private partnerships, and proposes mechanisms that would allow agencies to share resources and best practices with one another when creating and administering such partnerships.

- **Recommendation 2017-1, *Adjudication Materials on Agency Websites*** provides guidance regarding the online dissemination of administrative adjudication materials. It offers best practices and factors for agencies to consider as they seek to increase the accessibility of adjudication materials on their websites and maintain comprehensive, representative online collections of adjudication materials, consistent with the transparency objectives and privacy considerations of the Freedom of Information Act and other relevant laws and directives.
- **Recommendation 2017-2, *Negotiated Rulemaking and Other Options for Public Engagement*** offers best practices to agencies for choosing among several possible methods—among them negotiated rulemaking—for engaging the public in agency rulemakings. It also offers best practices to agencies that choose negotiated rulemaking on how to structure their processes to enhance the probability of success.
- **Recommendation 2017-3, *Plain Language in Regulatory Drafting*** identifies tools and techniques agencies have used successfully to write regulatory documents (including rulemaking preambles and guidance documents) using plain language, proposes best practices for agencies in structuring their internal drafting processes, and suggests ways agencies can best use trainings and other informational resources.
- **Recommendation 2017-4, *Marketable Permits*** provides best practices for structuring, administering, and overseeing marketable permitting programs for any agency that has decided to implement such a program.
- **Recommendation 2017-5, *Agency Guidance Through Policy Statements*** provides best practices to agencies on the formulation and use of policy statements. It lists steps that agencies can take to remain flexible in their use of policy statements and to encourage, when appropriate, public participation in the adoption or modification of policy statements.
- **Recommendation 2017-6, *Learning from Regulatory Experience*** offers advice to agencies on learning from different regulatory approaches. It encourages agencies to collect data, conduct analysis at all stages of the rulemaking lifecycle (from pre-rule analysis to retrospective review), and solicit public input at appropriate points in the process.
- **Recommendation 2017-7, *Regulatory Waivers and Exemptions*** provides best practices to agencies in structuring their waiver and exemption procedures for regulatory requirements. It encourages transparency and public input by asking agencies to consider establishing standards and procedures for approval of waivers and exemptions and to seek public comments in developing standards and procedures and in approving individual waivers and exemptions.
- **Recommendation 2016-1, *Consumer Complaint Databases*** encourages agencies that make consumer complaints publicly available through online databases or downloadable

data sets to adopt and publish written policies governing the dissemination of such information to the public. These policies should inform the public of the source and limitations of the information and permit entities publicly identified to respond or request corrections or retractions

- **Recommendation 2016-2, *Aggregate Agency Adjudication*** provides guidance to agencies on the use of aggregation techniques to resolve similar claims in adjudications. It sets forth procedures for determining whether aggregation is appropriate. It also considers what kinds of aggregation techniques should be used in certain cases and offers guidance on how to structure the aggregation proceedings to promote both efficiency and fairness.
- **Recommendation 2016-3, *Special Procedural Rules for Social Security Litigation in District Court*** encourages the Judicial Conference of the United States to develop a uniform set of procedural rules for cases under the Social Security Act in which an individual seeks district court review of a final administrative decision of the Commissioner of Social Security pursuant to 42 U.S.C. § 405(g).
- **Recommendation 2016-4, *Evidentiary Hearings Not Required by the Administrative Procedure Act*** offers best practices to agencies for structuring evidentiary hearings that are not required by the Administrative Procedure Act. It suggests ways to ensure the integrity of the decision-making process; sets forth recommended pre-hearing, hearing, and post-hearing practices; and urges agencies to describe their practices in a publicly accessible document and seek periodic feedback on those practices.
- **Recommendation 2016-5, *the Use of Ombuds in Federal Agencies*** takes account of the broad array of federal agency ombuds offices that have been established since the time of Recommendation 90-2. The recommendation suggests that agencies and Congress consider creating additional ombuds offices where they may be of benefit. It also emphasizes the importance of adherence by ombuds to the three core standards of independence, confidentiality, and impartiality, and identifies best practices for the operation, staffing, and evaluation of federal agency ombuds offices.
- **Recommendation 2016-6, *Self-Represented Parties in Administrative Hearings*** offers best practices for agencies dealing with self-represented parties in administrative hearings. Recommendations include the use of triage and diagnostic tools, development of a continuum of services to aid parties, and re-evaluation and simplification of existing hearing practices, where possible. The project builds on the activity of a working group on Self-Represented Parties in Administrative Hearings that is co-led by the Administrative Conference and the Department of Justice's Office for Access to Justice.
- **Recommendation 2015-1, *Promoting Accuracy and Transparency in the Unified Agenda*** offers proposals for improving the accuracy and transparency of the Unified Agenda of Federal Regulatory and Deregulatory Actions. Among other things, it urges agencies to consider providing relevant updates between Agenda reporting periods, offers recommendations for ensuring that Agenda entries are properly categorized by

projected issuance date and status, and encourages agencies to provide notice when entries are removed from the Agenda.

- **Recommendation 2015-2, *Technical Assistance by Federal Agencies in the Legislative Process*** offers best practices for agencies when providing Congress with technical drafting assistance. It is intended to apply to situations in which Congress originates the draft legislation and asks an agency to review and provide expert technical feedback on the draft without necessarily taking an official substantive position.
- **Recommendation 2015-3, *Declaratory Orders*** identifies contexts in which agencies should consider the use of declaratory orders in administrative adjudications. It also highlights best practices relating to the use of declaratory orders.
- **Recommendation 2015-4, *Designing Federal Permitting Programs*** describes different types of permitting systems and provides factors for agencies to consider when designing or reviewing permitting programs. It encourages agencies that adopt permitting systems to design them so as to minimize burdens on the agency and regulated entities while maintaining required regulatory protections.
- **Statement #19, *Issue Exhaustion in Pre-Enforcement Judicial Review of Administrative Rulemaking*** examines judicial application of an issue exhaustion requirement in pre-enforcement review of administrative rulemaking.
- **Recommendation 2014-1, *Resolving FOIA Disputes Through Targeted ADR Strategies*** addresses more effective use of alternative dispute resolution (ADR) approaches to help resolve disputes arising under the Freedom of Information Act (FOIA). The OPEN Government Act of 2007 created the Office of Government Information Services (OGIS), a part of the National Archives and Records Administration, to assist in the resolution of FOIA disputes through use of mediation and other ADR techniques. The recommendation suggests ways that OGIS can maximize the effectiveness of its resources for this purpose. The recommendation also suggests steps agencies can take to prevent or resolve FOIA disputes, including cooperating with OGIS and making FOIA staff and requesters aware of OGIS services.
- **Recommendation 2014-2, *Government in the Sunshine Act*** highlights best practices designed to enhance transparency of decision making at multi-member boards and commissions subject to the Government in the Sunshine Act. The recommendation urges covered agencies to provide a description of the primary mechanisms for conducting business, describe substantive business disposed of outside of open meetings subject to the Act (with appropriate protections for information made exempt from disclosure), and exploit new technologies to disseminate relevant information more broadly.
- **Recommendation 2014-3, *Guidance in the Rulemaking Process*** identifies best practices for agencies when providing guidance in preambles to final rules. It suggests ways that agencies can improve the drafting and presentation of these preambles, including making it easier to identify any guidance content. The recommendation also

urges agencies to ensure that users of their websites can easily locate the required small entity compliance guides.

- **Recommendation 2014-4, “Ex Parte” Communications in Informal Rulemaking** provides guidance and best practices to agencies for managing "ex parte" communications between agency personnel and nongovernmental interested persons regarding the substance of informal rulemaking proceedings conducted under 5 U.S.C. § 553.
- **Recommendation 2014-5, Retrospective Review of Agency Rules** examines agencies' procedures for reanalyzing and amending existing regulations and offers recommendations designed to promote a culture of retrospective review at agencies. Among other things, it urges agencies to plan for retrospective review when drafting new regulations; highlights considerations germane to selecting regulations for reevaluation; identifies factors relevant to ensuring robust review; and encourages agencies to coordinate with the Office of Management and Budget, other agencies, and outside entities (including stakeholders and foreign regulators) when designing and conducting retrospective reviews.
- **Recommendation 2014-6, Petitions for Rulemaking** identifies agency procedures and best practices for accepting, processing, and responding to petitions for rulemaking. It seeks to ensure that the public's right to petition is a meaningful one, while still respecting the need for agencies to retain decisional autonomy. Building upon ACUS's previous work on the subject, it provides additional guidance that may make the petitioning process more useful for agencies, petitioners, and the public.
- **Recommendation 2014-7, Best Practices for Using Video Teleconferencing for Hearings** offers practical guidance regarding how best to conduct video hearings, and addresses the following subjects: equipment and environment, training, financial considerations, procedural practices, fairness and satisfaction, and collaboration among agencies. It also provides for the development of a video hearings handbook by ACUS's Office of the Chairman.
- **Recommendation 2013-1, Improving Consistency in Social Security Disability Adjudication** identifies ways to improve the adjudication of Social Security disability benefits claims before administrative law judges and SSA's Appeals Council, suggests changes to the evaluation of opinion evidence from medical professionals, and encourages the SSA to enhance data capture and reporting. As announced in the Unified Agenda, the Administration is working on proposed regulations that would implement much of this recommendation.
- **Recommendation 2013-2, Benefit-Cost Analysis at Independent Regulatory Agencies** highlights a series of best practices directed at independent regulatory agencies in the preparation of benefit-cost analyses that accompany proposed and final rules.

- **Recommendation 2013-3, *Science in the Administrative Process*** promotes transparency in agencies' scientific decision making, including: articulation of questions to be informed by science information; attribution for agency personnel who contributed to scientific analyses; public access to underlying data and literature; and conflict of interest disclosures for privately funded research used by the agencies in licensing, rulemaking, or other administrative processes.
- **Recommendation 2013-4, *Administrative Record in Informal Rulemaking*** offers best practices for agencies in the compilation, preservation, and certification of records in informal rulemaking, and it supports the judicial presumption of regularity for agency administrative records except in certain limited circumstances.
- **Recommendation 2013-5, *Social Media in Rulemaking*** addresses the various policy and legal issues agencies face when using social media in rulemaking. The recommendation examines whether and when agencies should use social media to support rulemaking activities. It also seeks to identify relevant issues, define applicable legal and policy constraints on agency action, resolve legal uncertainty to the greatest extent possible, and encourage agencies to find appropriate and innovative ways to use social media to facilitate broader, more meaningful public participation in rulemaking activities.
- **Recommendation 2013-6, *Remand without Vacatur*** examines judicial remand of an agency decision for further consideration while allowing the decision to remain in place. It examines this remedy and equitable factors that may justify its application. The recommendation offers guidance for courts that remand agency actions and for agencies responding to judicial remands.
- **Recommendation 2013-7, *Review of GPRA Modernization Act of 2010*** examines the Act's requirements for cross-agency collaboration; identifies existing constraints to collaboration; highlights tools available to help agencies collaborate; and recommends potential new or enhanced avenues of collaboration.
- **Statement #18, *Improving the Timeliness of OIRA Regulatory Review*** highlights potential mechanisms for improving review times of rules under review by the Office of Information and Regulatory Affairs (OIRA), including promoting enhanced coordination between OIRA and agencies prior to the submission of rules, encouraging increased transparency concerning the reasons for delayed reviews, and ensuring that OIRA has adequate staffing to complete reviews in a timely manner.
- **Recommendation 2012-1, *Regulatory Analysis Requirements*** addresses the issue of agencies having to comply with numerous regulatory analysis requirements created by statute and executive orders. The recommendation is supported by an extensive report that includes an appendix charting all of the regulatory analysis requirements of the 100 major rules subject to OMB review in 2010. The goal of the recommendation is to ensure agencies fulfill the regulatory analysis requirements efficiently and to enhance the

transparency of the process. Agencies, the Congress, the President, and OMB's OIRA are all encouraged to play a role in this effort.

- **Recommendation 2012-2, *Midnight Rules*** addresses several issues raised by the publication of rules in the final months of a presidential administration and offers proposals for limiting the practice by incumbent administrations and enhancing the powers of incoming administrations to review midnight rules.
- **Recommendation 2012-3, *Immigration Removal Adjudication*** addresses the problem of case backlogs in immigration removals and suggests ways to enhance efficiency and fairness in these cases. Much of the recommendation was incorporated into the bipartisan immigration legislation (S. 744) that passed the Senate in 2013.
- **Recommendation 2012-4, *Paperwork Reduction Act*** addresses a variety of issues that have arisen since the Act was last revised in 1995, including those arising from the emergence of new technologies. The proposal offers suggestions for improving public engagement in the review of information collection requests and for making the process more efficient for the agencies and OMB.
- **Recommendation 2012-5, *Improving Coordination of Related Agency Responsibility*** addresses the problem of overlapping and fragmented procedures associated with assigning multiple agencies similar or related functions, or dividing authority among agencies. This recommendation proposes reforms aimed at improving coordination of agency policymaking, including joint rulemaking, interagency agreements, and agency consultation provisions.
- **Recommendation 2012-6, *Reform of 28 U.S.C. § 1500*** urges Congress to repeal Section 1500, which divests the United States Court of Federal Claims of jurisdiction when a plaintiff has claims against the government based on substantially the same operative facts pending in another court, and replace it with a provision that would create a presumption that in such circumstances, later-filed actions would be stayed. In 2015, the House Judiciary Committee favorably reported a bill in accordance with this recommendation and a companion ABA resolution endorsing the recommendation.
- **Recommendation 2012-7, *Third-Party Programs to Assess Regulatory Compliance*** addresses issues that arise when agencies develop programs in which third parties assess whether regulated entities are in compliance with regulatory standards and other requirements. In some areas of regulation, Congress has directed agencies to develop a third-party program; in others, regulatory agencies have developed programs under existing statutory authority. The recommendation sets forth guidance for federal agencies that are establishing, or considering establishing, such programs.
- **Recommendation 2012-8, *Inflation Adjustment for Civil Penalties*** addresses agency adjustments to civil monetary penalties under the Federal Civil Penalties Inflation Adjustment Act (28 U.S.C. § 2461 note). The recommendation urges Congress to change the current statutory framework by which agencies periodically adjust their penalties to

address three provisions that result in penalty adjustments that may not track the actual rate of inflation. It also advises agencies to adjust their penalties for inflation as required by law. As urged by the Administration, Congress implemented the recommendation in the Bipartisan Budget Act of 2016. The inflation-adjustment provisions of that Act will increase general revenues to the government by \$1.3 billion over the next ten years.

- **Recommendation 2011-1, *Legal Considerations in e-Rulemaking*** addresses legal issues associated with e-rulemaking and recommends best practices in dealing with them. These include whether agencies can require electronic filing, how they should address copyright and privacy concerns, whether and under what framework they can solicit comments through social media, and whether any amendments to the Administrative Procedure Act would be appropriate to address such issues.
- **Recommendation 2011-2, *Rulemaking Comments*** addresses certain best practices for agencies to consider in conducting the “comment” aspect of traditional notice-and-comment rulemaking under the Administrative Procedure Act. The recommendation addresses a possible minimum period for comments, standards for extension of the comment period, availability of comments to the public and provision for reply comments, whether agency delays may require updated comment periods, and the circumstances warranting confidentiality of material filed in public comments.
- **Recommendation 2011-3, *Government Contractor Ethics*** addresses the increasing use of contractors in government and asks the Federal Acquisition Regulation Council to adopt revisions regarding compliance standards for government contractor employees relating to personal conflicts of interest and use of certain non-public information. In February 2013, the American Bar Association’s House of Delegates adopted a resolution—based on Recommendation 2011-3—urging federal action to minimize government contractor personal conflicts of interest.
- **Recommendation 2011-4, *Video Hearings*** addresses best practices for the use of video hearings by federal government agencies with high volume case loads as a means of reducing caseload backlog and conducting more efficient adjudication.
- **Recommendation 2011-5, *Incorporation by Reference*** addresses ways in which agencies publish rules that refer to standards or other materials that have been published elsewhere. The recommendation proposes ways to ensure that materials subject to incorporation by reference are reasonably available to the regulated community and other interested parties, to update regulations that incorporate by reference, and to navigate procedural requirements and drafting difficulties when incorporating by reference. The Office of the Federal Register (OFR), among other agencies, has relied heavily on this recommendation in setting its regulatory policies. In late 2014, in fact, the OFR implemented the recommendation in a final rule modifying its long-standing requirements for incorporation by reference in all federal regulations.
- **Recommendation 2011-6, *International Regulatory Cooperation*** addresses how United States regulators can interact with foreign authorities to accomplish their domestic

regulatory missions and eliminate unnecessary non-tariff barriers to trade. The project updates Administrative Conference Recommendation 91-1, *Federal Agency Cooperation with Foreign Government Regulators*. The recommendation includes proposals for enhanced cooperation and information gathering, more efficient deployment of limited resources, and better information exchanges. The key features of this recommendation were incorporated into Executive Order 13,609.

- **Recommendation 2011-7, *FACA in the 21<sup>st</sup> Century*** addresses the administrative load imposed by Federal Advisory Committee Act (FACA) and offers proposals to Congress, the General Services Administration, and agencies that use advisory committees, to alleviate certain procedural burdens associated with the existing regime, clarify the scope of the Act, and enhance the transparency and objectivity of the advisory committee process.
- **Recommendation 2011-8, *Agency Innovations in e-Rulemaking*** addresses ways in which agency innovations and best practices can engage the public in rulemaking activities at low cost to the government.
- **Recommendation 2010-1, *Regulatory Preemption*** addresses agency procedures for determining whether to preempt state law. The recommendation presents best practices by federal agencies in implementing the requirements of Executive Order 13,132 and the President's May 2009 memorandum governing agency preemption of state law, including procedures for securing meaningful participation by state and local government officials in the process of considering questions of federal preemption.